Office-Supreme Court, U.S.
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APR 2 1965
JOHN F. DAVIS, CLERK

No. 1039

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

JEAN COBB KRUM,
Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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PEOPLE OF THE STATE OF MICHIGAN,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Petitioner, JEAN COBB KRUM, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in this case on January 5, 1965.

OPINIONS BELOW

The proceedings before the Honorable Edward H. Fenlon, Circuit Judge in and for the 33rd Judicial Circuit of the State of Michigan, are not officially reported but pertinent parts thereof are reproduced in Appellant's Appendix filed in the proceedings before the Supreme Court of Michigan.[1] The decision of the Supreme Court of Michi-

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[1] Hereinafter referred to as App.Mich.

gan was entered January 5, 1965, and appears in Appendix A hereto, pp. 1a *et seq.* It is reported at 374 Mich. 356; 132 N.W. 2d 69.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Michigan sought to be reviewed was dated and entered January 5, 1965.

This Court has jurisdiction of this cause by virtue of Title 28, U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether detention at the state police roadblock without arrest warrant or search warrant under the circumstances here involved constituted an unlawful arrest.

2. Whether a search during such detention violated petitioner's rights under the Fourth Amendment.

3. Whether a conviction for obstructing an officer, which arose out of petitioner's attempts to protest against and resist such arrest and search was in violation of petitioner's constitutional rights.

4. Whether it was prejudicial error for the trial court to refuse to charge the jury concerning the issue of the reasonableness of the arrest and search under such circumstances.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment and pertinent parts of the Fourteenth Amendment to the Constitution of the United States are set forth in Appendix B hereto, p. 1b, *infra*.

The pertinent section of the United States Code, being Title 28, Section 1257(3), is set forth in Appendix B hereto, p. 1b, *infra*.

The pertinent Michigan statutes, being CL 1948, Sec. 750.479 (Stat. Ann. 1954 Rev. Sec. 28.747), CL 1948, Sec. 750.193 (Stat. Ann. 1962 Rev. Sec. 28.390), and CL 1948, Sec. 750.195 (Stat. Ann. 1962 Rev. Sec. 28.392), are set forth in Appendix B hereto, p. 2b-3b, *infra*.

STATEMENT OF THE CASE

Some time between 6:00 P.M. and 10:23 P.M. in the evening of September 25, 1959, two young men, aged 24 to 25 years, escaped from the Mackinac County Jail at St. Ignace, Michigan, where they were being held in jail on a charge of breaking and entering (App. Mich. 30a *et seq.*).[2] One was over six feet tall and weighed 220 or 230 pounds, while the other was five feet three or four inches tall and weighed 130 pounds (App. Mich. 63a-64a). In an effort to apprehend them, the Michigan State Police, acting without judicial authority, established a blockade at, among other locations, the Mackinac Straits Bridge (App. Mich. 29a-32a). At about 8:00 P.M. on the following day, September 26, 1959, an anonymous informant reported that a 1956 two-tone green Oldsmobile bearing Mackinac County license plates had been stolen and its owner held up (App. Mich. 33a, 40a, *et seq.*). This report was broadcast to police units at about 8:02 or 8:03 P.M., with the opinion that the car thieves were the escapees, and all units were instructed to be on the lookout for this car and its two occupants (App. Mich. 41a *et seq.*). They were also instructed to search vehicles at the blockade, though no warrant or other judicial authority for such searches was obtained (App. Mich. 37a, 67a *et seq.*).

At about 8:30 P.M. on the following day, September 26, 1959, petitioner and two companions, Louis A. Taylor and Leslie L. Hill, arrived at the Mackinac Bridge in a green

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[2] Although escape from prison constitutes a felony under Michigan law, the escape here, being from a jail apparently constituted only a misdemeanor (App. B pp. 2b-3b *infra*).

and white 1956 Chevrolet with Kalamazoo County license plates. They were returning from a Canadian fishing trip and were appropriately dressed and equipped with a boat on top of the car and camping and fishing gear on the rear seat and floor. The car belonged to petitioner and was being driven by Mr. Taylor with petitioner sitting in the right front seat; Mr. Hill sat in the rear (App. Mich. 59a-60a). Petitioner was about forty years of age, approximately 5 feet 4 inches tall, and weighted at that time 130-140 pounds; Mr. Taylor was in his late thirties, approximately 5 feet 11 inches tall, and weighed 160-170 pounds; Mr. Hill was approximately 50 years of age, about 5 feet 10 inches tall, and weighed approximately 170 pounds (App. Mich. 64a). "They had a growth of beard" (App. Mich. 60a).

Maintaining the blockade at the bridge were Troopers Hurley and Sheppard of the State Police who had been informed on September 25, 1959 of the description of the escapees. (App. Mich. 52a). Though the record reveals that the report concerning the theft of the 1956 Oldsmobile was not broadcast until after 8:00 P.M. on September 26 (App. Mich. 34a, 39a, 43a), these officers testified that they were aware of the theft upon or before arrival at the bridge at 8:00 P.M. (App. Mich 52a, 99a). In any event, the procedure that they followed at the bridge was that while Sheppard indiscriminately examined the occupants and interior of each car, Hurley stood aside and to the rear with a carbine loaded and ready for firing (App. Mich. 55a).

After petitioner paid the toll, Trooper Sheppard asked Mr. Hill to move a bedroll in the back of the car but Mr. Hill refused to do this when it became clear that the officers had no search warrant (App. Mich. 60a). Trooper Sheppard then ordered the car to be pulled off the road onto the right hand shoulder, and walked over to it about 75 feet away. Trooper Hurley remained at the toll booth

checking other cars. At the car Trooper Sheppard conversed with petitioner who explained that they were returning from a Canadian vacation and that the car did not require a search (App. Mich. 60a-61a). Trooper Sheppard thereupon demanded to see petitioner's driver's license and automobile registration, both of which requests petitioner refused to comply with, the former on the ground that he was not driving the car at the time in question (App. Mich. 61a). At this point Trooper Sheppard called to Trooper Hurley, who was the senior of the two officers, and Trooper Hurley, reluctant to leave the toll booth, suggested that Trooper Sheppard bring petitioner to him (App. Mich. 61a). In the meantime petitioner had obtained his registration form from the car and then approached Trooper Hurley at the toll booth with the registration card and a pen in his hand (App. Mich. 148a *et seq.*) Trooper Sheppard returned to petitioner's car (App. Mich. 62a).

What occurred between petitioner and Trooper Hurley is a matter of conflicting testimony. It does appear, however, that petitioner was persistent in his demand to know not only the Trooper's name, which the officer supplied, but also his badge number (App. Mich. 148a *et seq.*). In attempting to ascertain the badge number, petitioner came between Trooper Hurley and cars at the booth, and there is evidence of some slight physical contact between them (App. Mich. 104a *et seq.*). In any event, Trooper Hurley arrested petitioner for obstructing him in the course of his duty, and forced him into the police car (App. Mich. 149a-152a). Petitioner was then handcuffed and taken to the Mackinac County Jail (App. Mich. 152a). After petitioner's departure from the scene, his companions, now thoroughly cowed by the police behavior, acquiesced to the search which had been demanded at the outset of the incident. Nothing of an

incriminating or suspicious nature was discovered as a result of this search. (Opinion of the Michigan Supreme Court, App. A, *infra*).[3]

After some procedural delays petitioner was convicted, after a jury trial April 25-27, 1961, of having obstructed an officer in the course of his duty in violation of Section 28.747 of the Michigan Annotated Statutes Revised.[4] There followed an unsuccessful appeal to the Michigan Supreme Court.

The federal questions here involved were timely raised both in the trial proceedings and on appeal. At the trial, questions were put to witnesses designed to elicit the fact that the arrest and search here involved were without reasonable or probable cause and hence illegal (App. Mich. 69a-92a). At the conclusion of the evidence the trial court was requested to charge the jury concerning the prerequisites of a lawful arrest and search; these charges were refused (App. Mich. 157a-172a). Petitioner's Motion for a New Trial relied for its principal ground on the failure of the trial court to instruct the jury concerning the federal questions here involved (App. Mich. 14a-22a); this motion was denied (App. Mich. 23a-24a). On appeal to the Michigan Supreme Court the denial of petitioner's rights under the Federal Constitution by an unlawful arrest and search were urged, but the arguments were rejected by the Court on the grounds that they had no bearing on the conviction (App. A, *infra*).

REASONS FOR GRANTING THE WRIT

The initial detention of petitioner and his companions at the toll booth was an arrest without warrant, without

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[3] Mr. Taylor was arrested for not having on his person the registration card for the car. Some months later this charge was dropped. (App. Mich. 81a)

[4] See, *infra* p. 2b.

reasonable or probable cause and as such was illegal. The subsequent search was also illegal, being violative of petitioners rights under the Fourth Amendment. Petitioner was acting within his rights to resist and delay such an arrest and search and his conviction for obstructing an officer when he attempted such resistance was in violation of his rights. The trial court erred in refusing to charge the jury concerning the issue of reasonableness in such circumstances, and the Supreme Court of Michigan erred in upholding the conviction in the absence of such a charge.

ARGUMENT

I. The Detention of Petitioner at the Toll Booth was an Illegal Arrest Being Without an Arrest or Search Warrant and Without Reasonable or Probable Cause.

In dealing with petitioner's contention that he had been unlawfully arrested and searched the court below determined that the question was not before it since the actions of the officers which petitioner contends denied his rights under the Federal Constitution "occurred sometime prior to the exact confrontation on which the complaint is based".[5] This conclusion, however, ignores the fact that the confrontation of which the court speaks was a continuation of a transaction which began when petitioner and his companions arrived at the bridge and refused to submit to a search. Although petitioner was handcuffed and taken away only after the confrontation with Trooper Hurley, he and his companions were arrested when they were ordered to pull the car off the road upon refusing to permit a search of it.

To constitute an arrest it is not necessary that the person arrested be physically restrained so long as there is an intention to detain him. It is clear that petitioner

[5] Appendix A., *infra.*, p. 1a.

was detained by and subject to the control and will of the troopers when he drew off the road, and was in fact arrested at that time. See *Henry* v. *United States*, 361 U.S. 98; *Jenkins* v. *United States*, 161 F. 2d 99 (C.A. 10, 1947); *Morton* v. *United States*, 147 F. 2d 28 (C.A.D.C. 1945); *United States* v. *Festa*, 192 F. Supp. 160 (D.C. Mass. 1960); *United States* v. *Scott*, 149 F. Supp. 837 (D.C.Dist. of Col. 1957).

This arrest was an arrest without warrant; it was admitted by the troopers at the trial that neither arrest nor search warrants had been obtained (App. Mich. 67a, 78a). The legality of the arrest and search then turned upon a showing of "reasonable or probable cause". U.S. Const. amend. XIV; *Mapp* v. *Ohio*, 367 U.S. 643. See also *Henry* v. *United States*, *supra*; *United States* v. *Di Re*, 332 U.S. 581; *Johnson* v. *United States*, 333 U.S. 10; *Giordanello* v. *United States*, 357 U.S. 480; *Brinegar* v. *United States*, 338 U.S. 160; *Draper* v. *United States*, 358 U.S. 307; *Stacey* v. *Emery*, 97 U.S. 642.

There was no showing of reasonable or probable cause for either the detention at the roadblock or the search of the car. It is doubtful that Troopers Hurley and Sheppard knew at that time of the theft of the Oldsmobile but, even if they did, the evidence was such that petitioner and his companions could not have been connected with the escapees by a reasonably prudent man:

1. The troopers were seeking *two* men in their twenties, one of whom was unusually light of build, while the other was unusually large. The *three* men in petitioner's car were all approaching or over forty years of age and were neither unusually large or small in build.

2. The occupants of petitioner's car as well as the car itself bore all signs of being precisely what the troopers were initially told—they were peaceable citizens returning from a fishing holiday. Had the troopers thought

otherwise the one with the loaded carbine, held at ready position, would have accompanied and covered his partner who walked over to the car at the side of the road, instead of remaining at the toll booth to check other cars.

3. The stolen car in which the escapees were believed to be travelling was a two-tone green 1956 Oldsmobile. Petitioner's car was a green and white 1956 Chevrolet (App. Mich. 40a-43a, 59a-61a).

4. The stolen car bore Mackinac County license plates, and the troopers testified that special attention was given to "local" county license plates. Petitioner's car bore "out of county" Kalamazoo County license plates (App. Mich. 87a-88a).

From all this it is submitted that there was no reasonable ground for the officers, acting without a warrant, to detain petitioner and his companions. In fact, that the troopers did not believe that petitioner was implicated with the escapees is reflected in their admissions on cross-examination (App. Mich. 83a-115a). In the same connection, neither trooper was able to articulate any reasonable ground to justify arresting petitioner's party (App. Mich. 69a *et seq.*, 113a).

II. The Search of Petitioner's Car was Also Illegal.

It is apparent from the record that petitioner's arrest and subsequent conviction arose, in fact, out of his resistance to the trooper's attempts to search his car. That

the search was the primary object in the troopers' minds throughout the incident is inescapable. It was Mr. Hill's insistence that a search warrant was required which precipitated the arrest. Trooper Sheppard testified:

> "If the man had moved the bedroll, he would be in Kalamazoo now, today" (26a)

Moreover, once petitioner had been confined and his companions cowed, the search was carried out. Thus was accomplished the illegal search which was the sole reason for the illegal arrest, all plainly in violation of petitioner's rights under the Fourth Amendment to the Constitution.

This Court has held that a search incident to a *lawful* arrest may be legal. *United States* v. *Rabinowitz*, 339 U.S. 56; *Brinegar* v. *United States*, *supra; Harris* v. *United States* 331 U.S. 145. But *reasonableness* must be shown. See *Henry* v. *United States*, *supra; Carroll* v. *United States*, 267 U.S. 132; *Agnello* v. *United States*, 269 U.S. 20. No simple test for reasonableness exists, *Harris* v. *United States*, *supra*, but it is clear that an "exploratory and general" search does not meet the requisite standard. *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344; *Lefkowitz* v. *United States*, 285 U.S. 452. The *Lefkowitz* case also forbids the use of an arrest as a mere pretext for carrying out an otherwise unreasonable search, as does the leading Michigan case, *People* v. *Gonzales*, 352 Mich. 247, 97 NW 2d. 16.

If a search pursuant to a *valid* arrest must conform to the standard of reasonableness, a search following an illegal arrest, as that in the instant case, should require no less a showing that it is reasonable. In any event, regardless of the legality of the arrest here, we submit that no justification existed for the search of petitioner's car. It has been shown that no reasonable ground existed to connect petitioner's party with the escapees. Nor did

the troopers have any reason to suspect that petitioner and his party were connected with some other crime. In short, what clearly emerges is the fact that petitioner and his friends were subjected to an indiscriminate detention and general search without justification or cause. This is borne out by the testimony of Trooper Sheppard (App. Mich. 66a-68a):

"Q. (By Mr. McNamara) Who gave you authority that evening to search those cars?

A. I got the call from the Corporal in the State Police Post in Cheboygan. Those are the orders.

Q. Did anybody tell you there was a warrant issued?

A. No, sir.

* * * *

Q. Now, what contact did you make to authorize your search, Trooper Sheppard? Did you apply for a search warrant?

A. No, sir.

Q. Did you apply for a warrant for the arrest of anyone?

A. No.

Q. Do you know of any warrant in existence for the arrest of any person?

A. No, sir.

Q. Do you know whether or not there was a search warrant in existence?

A. No, sir.

Q. You were indiscriminately searching, is that right, every car that came along, you were snooping in their car, searching in there, is that right?

A. No, sir.

Q. Didn't you say you looked in all these cars, checked all these cars?

A. Yes, sir.

Q. How many cars followed the Krum car through the blockade?

A. Several thousand.

This kind of indiscriminate search is expressly forbidden by the Fourth Amendment. It is the type of search pursuant to what was known in the 18th century as a "general warrant" that Lord Camden so roundly condemned in the renowned case of *Entick* v. *Carrington*, 19 Howell's State Trials 1029. Thus, petitioner was not only unlawfully arrested when he and his companions were detained at the roadblock, but his property was subjected to an illegal search in violation of the Fourth Amendment.

III. Petitioner Had a Legitimate Right to Resist the Unlawful Arrest and Search.

The decision below is premised on the assumption that petitioner's arrest and conviction arose solely out of the confrontation with Trooper Hurley. It was this notion which permitted the court below to pass over the federal questions presented in this matter. The confrontation with Trooper Hurley, however, was simply the last act in a transaction which began with petitioner's car being ordered off the road. From that point on petitioner was engaged in an effort to protest the unlawful arrest and prevent the proposed illegal search.

That he had the right to offer such resistance in defense of his constitutional rights is beyond dispute. See *John Bad Elk* v. *United States*, 177 U.S. 529; *Brown* v. *United States*, 159 U.S. 100. It is an accepted principle of Anglo-American jurisprudence, long known to the common law, that a citizen has the right to resist an unlawful arrest as an unlawful interference with his fundamental right of personal liberty. As Mr. Justice Peckham, delivering the opinion of the Court in *John Bad Elk* v. *United States*, *supra*, said:

> "If the officer had no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest" 177 U.S. at p. 535.

This principle is part of the law of the United States and of most of the States. See, for example, *People* v. *Denby*, 108 Cal. 54, 40 P. 1051; *Alday* v. *State*, (Fla.) 57 So. 2d 333; *Mullis* v. *State*, 196 Ga. 569, 27 SE 2d 91; *State* v. *Autheman*, 47 Idaho 328, 274 P. 805; *Parrott* v. *Commonwealth* (Ky.) 287 SW 2d 440; *State* v. *Robinson*, 145 Me. 77, 72 A. 2d 260; *Com.* v. *Crotty*, 10 Allen (Mass.) 403; *Hinton* v. *Sims*, 171 Miss. 741, 158 So. 141; *State* v. *Browers*, 356 Mo. 1195, 205 SW 2d 721; *State* v. *Calhoun*, 23 N.M. 681, 170 P. 750; *State* v. *Mobley*, 240 N.C. 476, 83 SE 2d 100; *Columbus* v. *Holmes*, 169 Ohio St. 251, 159 NE 2d 232; *Stanfield* v. *State*, 118 Tex. Crim. 47, 38 SW 2d 94; *State* v. *Mancini*, 91 Vt. 507, 101 A. 591; *Banks* v. *Bradley*, 192 Va. 598, 66 SE 2d 526; *State* v. *Rousseau*, 40 Wash. 2d 92, 241 P. 2d 447; *State* v. *Gum*, 68 W.Va. 105, 69 SE 463. Moreover, petitioner's acts of resistance were hardly excessive in the circumstances of the instant case. All that he sought was a positive identification (name and badge number) of one of the officers. He pressed his request, and was forcibly confined for his efforts. It is submitted that petitioner was acting well within his constitutional rights in doing what he did.

IV. In the Circumstances It Was a Denial of Petitioner's Rights Under the Federal Constitution for the Lower Court to Fail to Instruct the Jury as to the Reasonableness of the Arrest and Search After Requests For Such Instructions by Petitioner and It Was Error for the Appellate Court to Ignore This Issue.

For all the reasons elaborated above it is submitted that although petitioner was convicted of obstructing an officer primarily on the basis of the exchange between him and Trooper Hurley, the entire episode, beginning with the initial detention of the car at the toll booth, was pertinent to proper determination of guilt. Although petitioner repeatedly urged the trial court to charge the jury

concerning the reasonableness of an arrest and search, no such charges were made. Similarly the Supreme Court of Michigan passed entirely over the question of the illegality of the troopers' actions, though conceding that the right to resist an unlawful arrest must be acknowledged to exist.

It is submitted that this approach to the case was altogether too confined. Petitioner confronted and argued with Trooper Hurley, but this was merely the climax of his efforts to resist actions which he genuinely, and, it is submitted, with ample justification, believed violated his constitutional rights. The refusal of the lower courts to consider the possibility of a violation of such rights constituted error which should be rectified by this Court. In passing over this issue the courts below, in effect, decided a federal question in a manner inconsistent with the cited cases of this Court.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

46/Jan. 1964

(Filed January 5, 1965)

STATE OF MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

JEAN COBB KRUM,
Defendant-Appellant.

BEFORE THE ENTIRE BENCH.

KAVANAGH, C. J.

Defendant appeals by leave granted from conviction on jury verdict for a violation of CL 1948, § 750.479 (Stat Ann 1954 Rev § 28.747)[1] and from sentence thereupon to serve 30 days in the county jail and pay a $1,000 fine and $346.20 in costs.

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[1] "Sec. 479. Any person who shall knowingly and wilfully obstruct, resist or oppose any sheriff, coroner, township treasurer, constable or other officer or person duly authorized, in serving, or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of any ordinance, by law, or any rule, order or resolution made, issued, or passed by the common council of any city board of trustees, or common council or village council of any incorporated village, or township board of any township or who shall assault, beat or wound any sheriff, coroner, township treasurer, constable or other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or attempted to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years, or by a fine of not more than $1,000."

The criminal proceedings against defendant arose from an altercation which occurred between defendant and a member of the Michigan State police on September 25, 1959. Defendant and two traveling companions were returning from a fishing trip on that date, when the car in which they were riding was stopped at the Mackinac bridge by State police officers. The State police were looking for two prison escapees reported to be traveling by car and had established a blockade at the bridge. Defendant owned the car in which he and his companions were traveling, but some one else was driving it at the time it was stopped. One of the troopers asked the passenger in the back seat of the car to move a duffel bag and some equipment, to which the passenger replied that the trooper could not search the car without a search warrant. The trooper thereupon ordered the car driven to the side of the bridge, out of the line of traffic.

The defendant then got out of the car and advised the troopers that he and his companions were returning from a fishing trip, that there were no escapees in the car, and that there was no need to look into it. This aroused the officers' suspicions, which occasioned a rather loud discussion between the officers and defendant. When defendant was asked to show his driver's license, he refused to do so on the grounds that he had not been driving the automobile, and upon the further request that he show his registration certificate for the automobile, defendant declined so to do. Subsequently, despite his previous refusal to show the certificate, defendant got it from his glove compartment and returned to one of the troopers with the certificate and a pen in hand.

The trooper had, in the meantime, resumed his station near the tollgate where he was engaged in observing cars as they crossed the bridge.

Defendant testified that he asked the trooper his name; that he did nothing but write the name on a slip of paper,

whereupon the trooper arrested him for obstructing the officer in carrying out his duty to inspect other cars as they stopped.

The trooper testified that defendant had asked for his name and badge number; that he told the defendant his name and asserted that the badge number was meaningless; that defendant insisted on seeing his badge, and interposed himself between the trooper and the car to be inspected, finally brushing against the trooper and moving the automatic carbine from the position in which it was held by the trooper; that the trooper told defendant he was under arrest and ordered him to go to the police car; that defendant answered, "I don't have to and you can't make me;" that the trooper then took him by the wrist and, when he wouldn't move, pulled him over to the police car. There defendant was handcuffed and taken to the Mackinac county jail.

Defendant's companions thereupon permitted the remaining troopers to search defendant's car, which search resulted in the finding of nothing incriminating.

These events occurred on September 26, 1959. The day following his arrest defendant was released on bail. Complaint and warrant were issued in February of 1960, during which month a preliminary examination was held. In October of 1960 an amended complaint and warrant were issued, followed by a second examination in November.

In December 1960 defendant made a motion to quash the complaint and warrant on multiple grounds, which motion was denied. Defendant filed a motion for a speedy trial in March of 1961. The jury trial was then had in April of 1961, with the result noted above.

Defendant claims on appeal that the troopers had no probable cause to stop defendant's car and to search it. His argument is that his arrest was illegal and that he

was, therefore, entitled to resist it and to be told the identity of the troopers. He claims errors relating to the alleged illegality of his arrest were committed by the trial court in the denial of his motion for directed verdict at the conclusion of the People's case, in the denial of his motion for new trial, and in the refusal to give instructions, relating to the issue of the legality of his arrest, requested by the defendant.

Defendant also claims that the imposition of a jail sentence in addition to a fine is illegal in view of the statutory provision reproduced in the margin above, which authorizes imprisonment *or* a fine, the defendant's claim being that the statutory language is in terms alternative. He also suggests that in any event the sentence was grossly excessive under all of the circumstances and taking into account the defendant's past exemplary record.

In addition, defendant claims the delay in bringing the case to trial violated his constitutionally guaranteed right to a speedy trial.

To all of this, the People respond that defendant's conviction was for obstructing an officer in the performance of his duties and that the legality or illegality of the prior actions by the troopers had nothing whatever to do with the acts upon which conviction was based. The People respond to the claim the sentence was illegal by referring to CL 1948, § 769.5 (Stat Ann § 28.1077), which provides in part:

> "Whenever it is provided that an offender shall be punished by * * * fine or imprisonment, the court may impose both such fine and imprisonment in its discretion * * *."

It is first to be observed that obstructing a public officer is recognized in Michigan as a common law crime,[2] as

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[2] Tryon v. Pingree, 112 Mich 338.

well as an offense under the statute quoted above in the margin. This reflects the general rule:

> "The obstruction of or resistance to a public officer in the performance of his duties is an offense at common law, and by statute in all jurisdictions." (39 Am Jur, Obstructing Justice, § 8, p 506.)

While one may use such reasonable force as is necessary to prevent an illegal attachment [3] and to resist an illegal arrest,[4] the basis for such preventive or resistive action is the illegality of an officer's action, to which defendant immediately reacts. In the present case, however, the legality of the actions of the officers is not ruled on since they occurred sometime prior to the exact confrontation on which the complaint is based. It was not necessary to preservation of defendant's rights of personal liberty or property for him to have acted as the jury obviously believed he did, particularly since the officer had left the area and resumed his check of other cars.

Here the question is not whether the previous actions of the officers, aimed at defendant, were illegal or violative of his civil rights; if defendant was aggrieved thereby, he is not without remedy under the law. The question here is merely whether defendant obstructed the "officer, * * * authorized by law to maintain and preserve the peace, in [his] lawful acts, attempts and efforts to maintain, preserve and keep the peace * * *." The jury found that defendant did so obstruct justice, and we find no reason, on the facts or under the law, to disturb that finding.

Defendant's claim that the imposition of a fine and imprisonment is illegal because the statute under which he was charged provided for fine *or* imprisonment is in-

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[3] People v. Clements, 68 Mich 655.

[4] 5 Am Jur 2d, Arrest, § 94, pp 778-780.

effective in view of the statute, cited by the People and quoted above, which provides that under such an alternative penalty provision, the trial court may impose both alternatives, in its discretion. As to the claim that the sentence was excessive, it is found to be within the limits set by the statute, and that precludes our altering it. *People* v. *Connor*, 348 Mich 456.

The right to speedy trial, claimed by defendant to have been violated here, is guaranteed to the criminally accused by the Michigan Constitution of 1908, art 2, § 19.[5] The right to a speedy trial, as defined by *Hicks* v. *Judge of Recorder's Court of Detroit*, 236 Mich 689, and *People* v. *Den Uyl*, 320 Mich 477, means the right to a trial within a reasonable time, under all attendant circumstances, as will give the people an opportunity to present its case in court.

It cannot be said that a speedy trial was not given after request, since request was made in March and trial was held in April. See *People* v. *Foster*, 261 Mich 247.

One of the many circumstances to be considered in connection with reasonable time is whether the accused is free on bail, as defendant was in this case (*People* v. *Den Uyl*, *supra*, p 491), and the necessity for such *ad hoc* determination of the question demands that the decision be left largely within the discretion of the trial judge. (*Hicks* v. *Judge of Recorder's Court of Detroit*, *supra*.)

In view of the circumstances in this case, as described above, it cannot be said that the trial judge abused his discretion in finding no violation of the right of defendant to a speedy trial.

Judgment affirmed.

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[5] The current provision is found at Mich Const 1963, art 1, § 20.

APPENDIX B

United States Constitution

Amendment IV—Searches and Seizures

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 28

Sec. 1257. State courts; appeal; certiorari

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repug-

nant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

Michigan Statutes

CL 1948, Sec. 750.479 (Stat.Ann. 1954 Rev. Sec. 28.747)

Sec. 479. Any person who shall knowingly and wilfully obstruct, resist or oppose any sheriff, coroner, township treasurer, constable or other officer or person duly authorized, in serving, or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of any ordinance, by law, or any rule, order or resolution made, issued, or passed by the common council of any city board of trustees, or common council or village council of any incorporated village, or township board of any township or who shall assault, beat or wound any sheriff, coroner, township treasurer, constable or other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or attempted to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years, or by a fine of not more than $1,000.

CL 1948, Sec. 750.193 (Stat.Ann. 1962 Rev. Sec. 28.390)

Sec. 390. Breaking, escaping, and attempting to break or escape from prison; escaping from lawful custody outside confines of prison; punishment; place of trial; parole violator not an escapee.

Sec. 193. Any person, being imprisoned in any prison of this state for any term, who shall break prison and escape * * * shall be guilty of a felony * * *.

CL 1948, Sec. 750.195 (Stat. Ann. 1962 Rev. Sec. 28.392)

Sec. 392. Breaking, escaping or attempting to break or escape from jail; punishment.

Sec. 195. Any person lawfully imprisoned in any jail for any term, who shall break jail and escape * * * shall be guilty of a misdemeanor * * *.

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No. 1039

IN THE
SUPREME COURT OF THE UNITED STATES

JEAN COBB KRUM,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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PRINTED BY SPEAKER-HINES AND THOMAS, LANSING, MICHIGAN

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QUESTION PRESENTED

Is the defense of resistance to an illegal arrest or search available where the petitioner was stopped by police officers manning a blockade in an effort to apprehend two escaped criminals, and petitioner, after refusing to move a blanket which might have concealed a fugitive, was directed to park the car on the road shoulder, then petitioner went 75 feet to where officer was standing and, after being told to show his registration certificate and go on his way, interfered with the officer's handling of his loaded firearm?

STATUTES INVOLVED

Also involved is CL 1948 § 257.223 (MSA 1960 Rev Vol § 9.1923) set forth in full in Appendix A.

STATEMENT OF THE CASE

The statement of the case is in the main correct. However, the jury believed the police officers and it would seem appropriate to add to the statement the following. The officers made no attempt to search the Krum car until after the occurrences out of which the present case was brought were history. Trooper Sheppard said:

> "I told him • • • unless I had a search warrant I couldn't look under the bedroll." (60a)

Officer Hurley said:

> "Mr. Krum was talking to me, and I asked him to take it easy and show it [the registration certificate] to us and he could be on his way. But, at that time I was satisfied in my own mind—I don't know what took place before—but, what was taking place outside and in back, when Krum came over by me, he wasn't bothering me too much then, as far as in my own mind Mr. Krum didn't fit the description, that I thought he would be one of the criminals at that time, so I started back to check. Mr. Krum came up to me, and I said, 'Now, stand back just a second, I want to check this car,' and I had this here thirty carbine loaded with a thirty round clip in it. I always keep one in the chamber ready to go. So then, he wanted to know who I was and what my badge number was, and he started to move around in front of me and I told him to step back, that you are sort of bothering me here, and it is a dangerous thing here in front with this gun. Of course, the gun, the way I was standing, it was always pointed towards the car that was coming up, and with a shell in the chamber, things could happen.
>
> • • •

"You say he brushed up against you. Can you tell us what you mean by that?

"Well, he brushed up toward my arm and gun, which interfered with the moving of the gun over—he moved the gun over, which interfered with me trying to perform my duty, and at the same time when you start to hold a gun, you hold it with both hands, because you have to control the gun.

"Was there a touching?

"There was a touching between him and I; yes. And, I told him to step back; if he would just show us his registration he could be on his way, because we had a more important job to do here; we got two criminals out and we weren't out there to fool around. So, his remark was, 'I don't have to and you can't make me,' and I told him again, I said, 'I am telling you once more now to get out of my way, because you are interfering with me performing my duties; I am looking for the criminals in the cars and notifying the people for their safety,' and so forth.

"What did he do then?

"The same remark again, 'I don't have to and you can't make me'. So, that is when he came in contact with the gun, he brushed up against me because he wanted my badge number. So, I told him, 'You are under arrest; you will have to go to the patrol car.' And he remarked again, 'I don't have to and you can't make me.' So, I put the gun in one hand and I took him by the wrist and he wouldn't move, so I did have to pull him with enough force to pull him over to the car." (104a-106a)

A man weighing 130 pounds could have been hiding under the blanket. (90a, 132a)

ARGUMENT

THE DEFENSE OF RESISTANCE TO AN ILLEGAL ARREST OR SEARCH IS NOT AVAILABLE WHERE THE PETITIONER WAS STOPPED BY POLICE OFFICERS MANNING A BLOCKADE IN AN EFFORT TO APPREHEND TWO ESCAPED CRIMINALS, AFTER REFUSAL TO MOVE A BLANKET, WAS DIRECTED TO PARK THE CAR ON THE ROAD SHOULDER, PETITIONER WENT 75 FEET TO WHERE OFFICER WAS STANDING AND, AFTER BEING TOLD TO SHOW HIS REGISTRATION CERTIFICATE AND GO ON HIS WAY, INTERFERED WITH THE OFFICER'S HANDLING OF HIS LOADED FIREARM.

I.

The stopping of petitioner's car at the Mackinac Straits was not an illegal arrest. In so stating, we are not unaware of *People v. Gonzales*, 356 Mich. 247.

> "Sheriffs and other law enforcement officers possess authority to set up roadblocks in a reasonable manner for the apprehension of fleeing violators. Such authority is inherent in the power and the duties of law enforcement officers if those duties are to be effectively discharged." *Kegal v. Brugger*, 19 Wis 2d 1, 119 NW 2d 394, 396.

Justice Smith's concurring opinion in *People v. Gonzales*,

supra, termed a car search in the vicinity of a prison break as more an act of mercy than oppression.

In *State v. Hatfield,* 112 W. Va. 424, 164 SE 518, a case involving a roadblock the Court stated:

> "The duty to suppress crime and to arrest violators of the law, necessarily carries with it the right to stop persons for the purpose of identification. And this logically extends to those traveling on the highways in motor and other vehicles. It has always been the custom for cordons to be thrown out in the vicinity of a crime, or where an offender is supposed to be in hiding, and to stop all persons for purpose of identification, in order that felons may be apprehended. This is a necessary and reasonable restraint for protection of our personal liberty. 'The right of personal liberty consists in the power of locomotion, of changing situation, of moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due process of law.' Voorhees, Law of Arrests, p. 1, citing 1 Bl. Com. 135; *Butchers' Union, etc. Co. v. Crescent City, etc. Co.,* 111 U.S. 746, 28 L. Ed. 585; *In Matter of Jacobs,* 98 N.Y. 98. The same author also states at page 7 that 'The assurance of personal liberty does not license any person to be free from restraint; on the contrary, it demands such necessary restraint of persons as will insure the utmost amount of personal liberty to each, for the safety and well-being of society are paramount to individual liberty.' Since the advent of the motor age, the legislature, which has primarily the power, subject to constitutional restrictions, to control and regulate the use of public highways, has invoked a system of registration for all motor vehicles for the benefit and protection of the public. In addition to license plates, Code

1931, 17-6-2, provides for a registration certificate which shall at all times be carried in each vehicle, 'subject to examination upon demand by any proper officer.' And under section 27, article 8, of the same chapter, authority is given to all members of the department of public safety to render necessary assistance to the road commission in seeing that the highways are properly policed and that only those duly authorized operate vehicles thereon. This protects automobile owners in their property, and against unauthorized drivers. If a party, upon inquiry, can show proper credentials he may proceed; if not, he may be taken into custody or directed to appear before a proper officer for hearing. The public is thus accorded additional security. A law abiding citizen cannot have a valid objection to the inconvenience of being stopped, so long as he is accorded courteous treatment. The officers, under the existing circumstances, were warranted in stopping Osborne's automobile for purposes of identification; otherwise, the enforcement of law and order would be greatly hampered."

"Whether an officer has a right to stop an automobile and interrogate the occupants is a question distinct from whether he has a right to stop a vehicle, make an arrest, and conduct a search. Much less information is required to justify the actions of an officer in engaging in such interrogation than is necessary to warrant arrest and search." *People v. McLaine,* 204 Cal. App. 2d. 693, 22 Cal. Rpts. 72, 75.

Applying the foregoing principles to the instant case, it is clear that petitioner was not denied his constitutional rights.

II.

Petitioner contends that he had a right to resist the allegedly unlawful search. However, it is clear that no search of the Krum automobile was contemplated at the time of the fracas which petitioner claimed to be in defense of his constitutional rights. Trooper Sheppard said that he could not search the car without a search warrant. (60a) Since this is the only statement relative to any intended search, it is quite obvious that the officers did not intend to search the car prior to the obtaining of a search warrant. This in spite of the fact that a man the size of one of the escaped prisoners could have hidden beneath the blanket.

III.

In any event the acts of which petitioner conceivably could complain and defend against occurred prior to and at a place remote from the occurrences forming the basis for the charge.

The occupants were first approached by Trooper Sheppard. He was told that the bedroll in the back of the car would not be moved without a search warrant. Since more cars were approaching the blockade point, the driver of the Krum car was told to pull the car over to the side of the road. (60a) Trooper Sheppard walked to the back of the car and petitioner came out of the car to talk to him. Petitioner stated that they were coming back from a fishing trip and that there were no escapees in the car and there was no use to look into it. This made Trooper Sheppard suspicious and he asked petitioner for his driver's license and registration certificate, which request was refused. Trooper Sheppard then called for Trooper Hurley at the

blockade point which was approximately 75 feet away. (61a) Cars were approaching the blockade point so Trooper Hurley asked that Trooper Sheppard and Petitioner come to where he was. Trooper Hurley did, however, walk out and meet petitioner about 10 feet from where he was standing and Trooper Sheppard went back to petitioner's car. Trooper Hurley asked Petitioner for his driver's license and registration which request was refused. Trooper Hurley then walked back to the blockade point to check approaching cars, and petitioner followed him. (103a, 104a) It is from the encounter which followed that the charge arose on which petitioner was convicted. Trooper Hurley testified as follows:

> "• • • Mr. Krum came up to me, and I said, 'Now stand back just a second, I want to check this car,' and I had this here thirty carbine loaded with a thirty round clip in it. I always keep one in the chamber ready to go. So then, he wanted to know who I was and what my badge number was, and he started to move around in front of me and I told him to step back, that you are sort of bothering me here, and it is a dangerous thing here in front with this gun. Of course, the gun, the way I was standing, it was always pointed towards the car that was coming up, and with a shell in the chamber, things could happen.
>
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>
> "You say he brushed up against you. Can you tell us what you mean by that?
>
> "Well, he brushed up toward my arm and gun, which interfered with the moving of the gun over—he moved the gun over which interfered with me trying to per-

form my duty, and at the same time when you start to hold a gun, you hold it with both hands, because you have to control the gun.

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"There was a touching between him and I; yes. And, I told him to step back; if he would just show us his registration he could be on his way, because we had a more important job to do here; we got two criminals out and we weren't out there to fool around. So, his remark was, 'I don't have to and you can't make me,' and I told him again, I said, 'I am telling you once more now to get out of my way, because you are interfering with me performing my duties; I am looking for the criminals in the cars and notifying the people for their safety,' and so forth.

"What did he do then?

"The same remark again. 'I don't have to and you can't make me.' So, that is when he came in contact with the gun, he brushed up against me because he wanted my badge number. So, I told him, 'You are under arrest; you will have to go to the patrol car.' And he remarked again, 'I don't have to and you can't make me.' So I put the gun in one hand and I took him by the wrist and he wouldn't move, so I did have to pull him with enough force to pull him over to the car." (104a-106a)

Surely Petitioner may not seriously contend that he was resisting an illegal arrest or unlawful search by following Trooper Hurley and persisting in his efforts to obtain the Trooper's badge number. It is obvious from the foregoing

testimony of Trooper Hurley that nothing occurred between him and the Petitioner which justified Petitioner to interfere with Trooper Hurley in the conduct of his lawful business. The only demand made on Petitioner by the Trooper was that he produce his registration certificate as required by CL 1948 § 257.223, MSA 1960 Rev Vol § 9.1923.

In regard to Petitioner's refusal to produce his registration certificate, it is respectfully submitted that this refusal alone was sufficient to support Petitioner's conviction for obstructing and opposing a police officer of the State of Michigan. In *People v. Fidler*, 280 N.Y. App. Div. 698, 117 N.Y. 2d 313, 318, a state statute required State Police to inspect motor vehicles, the purpose being to detect inadequacy of equipment, overloading and other violations of the law. The police observed five vehicles upon the highway driven by the defendants which appeared to be overloaded. The police stopped the trucks and ordered them on the portable scales. The drivers refused, took their keys out of the ignition switch, locked some of the cab doors and refused to give the keys to the police officers. The Court held:

> "But the refusal to drive the trucks on the scales, together with the shutting off of the motors; the removal and retention of the ignition keys and the locking of some of the cab doors, in their totality presented a factual pattern of events upon which a jury might be warranted in finding resistance and obstruction of the duty the police were attempting to perform."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Every owner upon receipt of a registration certificate shall write his signature thereon with pen and ink in the space provided. Every such registration certificate shall at all times be carried in the vehicle to which it refers or shall be carried by the person driving or in control of such vehicle who shall display the same upon demand of a police officer. MSA 1960 Rev Vol § 9.1923; CL 1948 § 257.223.